Supreme Court, U.S.
FILED
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(2)

No. 00-506

In The

Supreme Court of the United States

JOHN V. KLIEBERT,

Petitioner,

- against -

GENERAL ELECTRIC COMPANY, INCORPORATED, KIDDER, PEABODY GROUP, INCORPORATED, KIDDER, PEABODY & COMPANY, INCORPORATED, EDWARD A. CERULLO, RICHARD LAFERGOLA and JOEL "JJ" MCKOAN, and JOHN & JANE DOES 1-25,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *certiorari* should be granted in connection with the New York courts' award of attorneys' fees against petitioner, under New York law, for pursuing this frivolous litigation when petitioner has failed to show any important federal question or any conflict of authority.

LIST OF PARTIES

The parties to the proceeding below were:

John V. Kliebert, Petitioner;

General Electric Company, Respondent;

Kidder, Peabody Group Inc., Respondent;

Kidder, Peabody & Co. Incorporated, Respondent;

Edward A. Cerullo, Respondent;

Richard LaFergola, Respondent; and

Joel "JJ" McKoan, Respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to rule 29.6 of this Court's Rules of Practice, Respondents state:

1. Respondent General Electric Company is publicly held and is the indirect parent of the successor to Respondent Kidder, Peabody Group Inc. Paine Webber Group Inc. is publicly held and is the parent of Respondent Kidder, Peabody & Co. Incorporated.

2. Respondents' other affiliates are not publicly held.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS[1]

10/24/97	unpublished order ("Final Order") of the New York Supreme Court, New York County dismissing complaint, enjoining Petitioner from commencing further litigation in connection with the allegations underlying the complaint, awarding Respondents attorneys' fees, and severing the issue of attorneys' fees
12/22/97	unpublished judgment ("Final Judgment") on the 10/24/97 order
06/03/98	unpublished judgment ("Attorneys' Fees Judgment") awarding Respondents $60,000 in attorneys' fees
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01/18/00	268 A.D.2d 306, 700 N.Y.S.2d 821 (1st Dep't 2000)

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[1] This list contains citations to the reports, as well as selected unpublished orders and judgments referenced in this Brief in Opposition to Petition for Certiorari. None of the documents comprising Petitioner's Appendix, including the opinions and orders (Permission for a Writ of Certiorari to the New York Supreme Court (the "Petition") at 1a-36a), are true copies of documents contained in the record on appeal. They appear to be Petitioner's sometimes inaccurate transcription of such documents. Respondents were never served with the entire document annexed at pages 86a-312a of the Petition.

06/29/00 95 N.Y.2d 829, 734 N.E.2d 1210, 712 N.Y.S.2d 909 (2000)

STATEMENT OF THE CASE

Preliminary Statement

This Court lacks jurisdiction over most of the issues raised by the Petition, which relate to a judgment that was *not* appealed to New York's highest court. (See Point I, *infra*). Petitioner has failed to satisfy any of the criteria warranting a grant of the Petition under Rule 10 of this Court's Rules of Practice with respect to his only claim as to which this Court could have jurisdiction, the *amount* of attorneys' fees awarded for frivolous litigation. (See Point II, *infra*).

STATEMENT OF FACTS

A. Background to *Kliebert I* and this Action, *Kliebert II*

In April 1993, Petitioner was dismissed from Kidder's employ (R. 621, ¶ 4; R. 668-69). Kidder Group and General Electric are Kidder affiliates (R. 620-21, ¶¶ 2-4; R. 668). Cerullo, LaFergola and McKoan were Kidder employees (R. 621, ¶¶ 5-7; R. 668).

In late 1993 Petitioner made threatening statements to Respondents, engaged in threatening behavior and possessed weapons (R. 668-69, 678). As a result, the People filed a misdemeanor complaint (*People v. Kliebert*) charging Petitioner with menacing and the Criminal

Court ordered Petitioner to stay away from Kidder employees and to undergo psychiatric treatment (R. 668-69, 677-78).

The Criminal Court dismissed *People v. Kliebert* because it did not plead facts sufficient to support a menacing charge; the dismissal was *not* on the merits (R. 671, 677-78). To the contrary, the Criminal Court stated that the allegations of the complaint in *People v. Kliebert* could have supported an aggravated harassment charge (R. 671).

B. The Dismissal of *Kliebert I*

In *Kliebert I*, Petitioner sought to use the technical dismissal of *People v. Kliebert* as a pretext to claim $111 million in damages against Respondents. Petitioner initially had counsel in *Kliebert I*, who prepared the complaint and amended complaint in that action (R. 603-14), but who withdrew soon thereafter.

The court dismissed *Kliebert I* on motion. (R. 670-72). The court also denied Petitioner's motion to serve a second amended complaint because that pleading "contain[ed] essentially the same causes of action and the same conclusory and unsubstantiated allegations" as the amended complaint (R. 672).

Petitioner appealed the judgment in *Kliebert I* until leave to appeal to the New York Court of Appeals was denied.[2]

Petitioner untimely sought a writ of *certiorari* from this Court. (R. 681).

C. The *Kliebert II* Complaint and Petitioner's Default

Petitioner then commenced this frivolous second case – *Kliebert II* – alleging the same facts as in *Kliebert I*.

Petitioner defaulted on Respondents' motion to dismiss, but Petitioner then moved to vacate the default (R. 838-42, 844-49). The New York Supreme Court denied the motion to vacate on the ground that *Kliebert II* was nothing more than an "attempt[ ] to revive claims clothed in different legal theories, based upon the same facts that underlie [*Kliebert I*]." (R. 17-19).

The Appellate Division affirmed, and the Court of Appeals dismissed Petitioner's motion for leave to appeal.[3]

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[2] *See Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 (1st Dept.), *leave to appeal denied*, 89 N.Y.2d 802, 675 N.E.2d 1232, 653 N.Y.S.2d 279 (1996).

[3] *See Kliebert v. General Electric Co.*, 254 A.D.2d 197, 679 N.Y.S.2d 566 (1st Dep't 1998), *leave to appeal dismissed*, 93 N.Y.2d 957, 716 N.E.2d 699, 694 N.Y.S.2d 634 (1999).

D. Petitioner Does Not Appeal the *Kliebert II* Final Order and Final Judgment

Shortly after the New York Supreme Court denied Petitioner's motions to vacate his default in *Kliebert II* (and after Petitioner appealed from that order to the Appellate Division), the court entered an order (the "Final Order") dismissing the *Kliebert II* complaint, enjoining Petitioner from commencing further litigation in connection with the allegations underlying the complaint, and awarding Respondents their attorneys' fees. (R. 1258-60). The court also severed the issue of attorneys' fees, and directed a separate hearing (the "Hearing") to determine the amount of attorneys' fees to be awarded. (R. 1260). Petitioner did not appeal from the Final Order or the resulting December 22, 1997 judgment (the "Final Judgment").

E. The *Kliebert II* Attorneys' Fees Hearing and Appeal

At the Hearing held on June 1 and 2, 1998 (R. 82-405), the same counsel who represented Petitioner in connection with *Kliebert I* zealously represented Petitioner and successfully opposed introduction of certain evidence. (R. 183, 222). Counsel also cross-examined Respondents' witness and called his own witness.

At the close of the Hearing, the court awarded Respondents $60,000, approximately $17,000 less than requested. (R. 404). This award was reduced to a judgment (the "Attorneys' Fees Judgment") from which Petitioner appealed. (R. 3-8).

On appeal from the Attorneys' Fee Judgment, in addition to challenging the amount of the award, Petitioner sought to challenge the then no longer appealable Final Order and Final Judgment, including the dismissal of the complaint, the fact of the attorneys' fees award and the injunction enjoining Petitioner from commencing further litigation in connection with the allegations underlying the complaint.

The Appellate Division (1) affirmed the amount of fees awarded, finding that the "value of [Respondents'] attorneys' services, which [Petitioner] was directed to pay as a sanction for frivolous conduct, were reasonably assessed at $60,000," (2) dismissed Appellant's second attempt to appeal the merits of the dismissal of *Kliebert II*, and (3) held that Petitioner's other claims, including his attempt to appeal from the injunction and the fact of the attorneys' fees award, were "without merit."[4] The Court of Appeals denied Petitioner's motion for leave to appeal and to expand the record on appeal.[5]

Petitioner now seeks a writ of *certiorari*.

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[4] *Kliebert v. General Electric Co.*, 268 A.D.2d 306, 700 N.Y.S.2d 821 (1st Dep't 2000).

[5] *Kliebert v. General Electric Co.*, 95 N.Y.2d 829, 734 N.E.2d 1210, 712 N.Y.S.2d 909 (2000).

REASONS FOR DENYING THE PETITION

I.

THIS COURT DOES NOT HAVE JURISDICTION OVER AN APPEAL FROM THE FINAL ORDER AND FINAL JUDGMENT

This Court has no jurisdiction to grant *certiorari* with respect to the Final Order and Final Judgment, dismissing *Kliebert II*, enjoining further related litigation and awarding attorneys' fees, because Petitioner failed to appeal from that order and judgment, and thus failed to obtain a decision of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257.

Petitioner's appeal from the Attorneys' Fees Judgment does not bring up for review earlier final orders or judgments. N.Y. Civ. Prac. L. & R. 5501(a); *Crystal v. Manes*, 130 A.D.2d 979, 516 N.Y.S.2d 823 (4th Dep't 1987).

The Final Order and Final Judgment were final orders under N.Y. Civ. Prac. L. & R. 5501(a) because the Final Order severed the issue of the amount of attorneys' fees to be awarded, the only issue that remained to be resolved after that order. *In re Liquidation of Union Indemnity Ins. Co.*, 224 A.D.2d 319, 638 N.Y.S.2d 52 (1st Dep't 1996) (severance "create[s] finality and promote[s] judicial economy . . . by generating a final judgment and thus a jurisdictional basis for review by the Court of Appeals"). The same would have been true under federal law. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988) ("a decision on the merits is a 'final decision' for purposes of [28 U.S.C.] § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case").

Petitioner's June 29, 1998 notice of appeal (which would have been untimely as to the Final Order and Final Judgment in any event) appealed only from the Attorneys' Fees Judgment (R. 3). N.Y. Civ. Prac. L. & R. 5513(a). Yet, Petitioner attempts to raise here each of the issues resolved by the Final Order and Final Judgment. (*See* Petition at 34, 149a-160a, 241a-312a (arguing merits of *Kliebert II* complaint; Petition at 33, 241a (arguing propriety of injunction); Petition at 9-12, 114a-116a (arguing propriety of award of attorneys' fees)).

Because Petitioner did not appeal from the Final Order and Final Judgment, there was never a judgment of the "highest court of [New York] in which a decision could be had" as to the issues resolved by that order and judgment (i.e., dismissal of *Kliebert II*, the award of attorneys' fees, and the injunction from suit), and Petitioner may not obtain review of those issues in this Court. Accordingly, the only issue raised by the Petition over which this Court may have jurisdiction is the constitutionality of the Attorneys' Fees Judgment awarding $60,000 in fees.

II.

PETITIONER HAS NOT IDENTIFIED ANY COMPELLING REASONS

This Court will grant a petition for writ of *certiorari* "only for compelling reasons." Sup. Ct. R. 10. In connection with a state court decision, Rule 10(b) and (c)

describe the "character of the reasons the Court considers," as follows:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner has not identified any important federal question or any conflict of authority. Instead, although not entirely clear, he appears to attack, without citation to a single supporting judicial precedent, the constitutionality of the Attorneys' Fees Judgment on three grounds: (1) the retroactive application of the 1998 amendment to 22 N.Y.C.R.R. § 130-1 to the Attorneys' Fees Judgment violates the Constitution (Petition at 9-13); (2) the evidence did not support the amount of the award (Petition at 18-32); and (3) the Attorneys' Fees Judgment was supported by misrepresentations at the Hearing (Petition at 13-18, 27-28).

A. The State Courts' Application of the 1998 Amendment to 22 N.Y.C.R.R. § 130-1 Does Not Raise a Federal Question

Section 130-1.1(a) of the New York Code Rules and Regulations provides in relevant part:

> The Court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and *reasonable attorney's fees, resulting from frivolous conduct* as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. [emphasis added.]

Petitioner's primary argument is that the 1998 amendment to 22 N.Y.C.R.R. § 130-1, which eliminated the $10,000 maximum amount of a legal fees award, does not apply because Respondents' entitlement to attorneys' fees under § 130-1 – as opposed to the determination of the amount – was part of the court's October 24, 1997 Final Order. Thus, according to Petitioner, the 1998 amendment should not apply to the amount of the award, limiting the award to $10,000. (Petition at 9-13). Whether the 1998 amendment to 22 N.Y.C.R.R. § 130-1 applies to the Attorneys' Fees Judgment is entirely a matter of New York law. Moreover, Petitioner has not preserved this argument.

The interpretation of a state statute as well as a determination of its retroactivity is governed by state law. *See Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 361-64 (1932) (Cardozo, J.). In *Great Northern Ry.*, discussing a state court's retroactivity determination as to its common law rules, Justice Cardozo, speaking for a unanimous Court, held:

> We think the Federal Constitution has no voice on the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.

Great Northern Ry. Co., 287 U.S. at 364. There is no reason the federal Constitution has any greater interest in a state's determination of the retroactivity of state statutes or rules than of its common law. Accordingly, Petitioner's argument as to the retroactivity of the 1998 amendment does not raise any federal question, let alone an important one.

Indeed, the rule was not applied retroactively. The 1998 amendment to § 130-1 went into effect on March 1, 1998. *See* New York State Register, Vol. 20, Issue 4 (January 28, 1998). The Hearing was held three months *later* on June 1 and 2, 1998, and judgment was entered on June 3, 1998. Thus, it was proper for the court to apply the rule in effect at the time of the Hearing and judgment to the amount of this award. *Bank of Smithtown v. Boglino*, 759 A.D.2d 574, 686 N.Y.S.2d 499 (2d Dep't 1999) (applying amended § 130-1 to pre-1998 conduct); *Greene v. Merchants & Businessmen's Mutual Ins. Co.*, 259 A.D.2d 519, 686 N.Y.S.2d 454 (2d Dep't 1999) (recognizing that amended § 130-1 – with greater than $10,000 limit – would apply to attorneys' fees award entered on January 28, 1998). The same rule would apply under federal law. *Landgraf v. USI Film Products*, 511 U.S. 244, 276-278 (1994) (recognizing that a new provision providing for attorneys' fees would apply to conduct that predated the new

fees provision) (citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974)).

In addition, Petitioner has failed to preserve this issue for review by this Court. This Court cannot review issues that a litigant was procedurally barred from raising in the state courts. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 397-98 (1990) (refusing to consider constitutional issues procedurally barred under state law).

Petitioner's counsel did not object to the court's application of the 1998 amendment at the Hearing nor at any time prior to the entry of the Attorneys' Fees Judgment. Under New York law, Petitioner is barred from raising this ground on appeal. *See, e.g., In re Transit Casualty Co.*, 223 A.D.2d 488, 636 N.Y.S.2d 791 (1st Dep't 1996) (recognizing that it is improper to raise arguments not raised to the court below); *Rosenberg v. Haddad*, 208 A.D.2d 468, 617 N.Y.S.2d 330 (1st Dep't 1994) (precluding litigant from raising argument for first time on appeal); *Telemark Construction, Inc. v. Greenberg*, 205 A.D.2d 438, 613 N.Y.S.2d 900 (1st Dep't 1994) (recognizing that failure to raise issue at trial constitutes waiver on appeal).

B. Petitioner's Challenge to the the Evidence Supporting the Attorneys' Fees Judgment Does Not Raise a Federal Question

Due process requires a fair hearing before an unbiased tribunal. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Petitioner does not challenge the procedures employed nor the impartiality of the judge. In light of the thorough hearing held and the evidence in the record supporting

the court's award, the Hearing more than satisfied due process.

Rule 10 provides that a writ "is rarely granted when the asserted error consists of erroneous factual findings." Petitioner raises no more of an argument. Petitioner claims that the evidence did not support the award, and, without any finding by any court, that the Attorneys' Fees Judgment was supported by false testimony. These are challenges to the weight of the evidence and the credibility of the witnesses, which the New York courts decided against Petitioner.

CONCLUSION

To the limited extent this Court has jurisdiction, Petitioner has failed to identify an important federal question or a conflict of authority, and the Petition should be denied.

Dated: November 2, 2000

Respectfully submitted,

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